Supreme Court, U.S.
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No. 02-___

In The
Supreme Court Of The United States

Patricia Snowden,

Petitioner,

and

Karen Dowhite, Sheila Diane Dowhite, Lilistyne Dowhite, Renee Wingo Roberts, and Michael Smith, Sr.

Plaintiffs,

v.

CheckPoint Check Cashing and Elite Financial Services, Incorporated

Respondents,

and

Unknown Other Persons and Entities,

Defendants

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the lower court erred by holding, in direct conflict with three state courts of last resort, that under the Federal Arbitration Act ("FAA"), 9 U.S.C. §§ 1 *et seq.*, and this Court's holding in *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967), an arbitrator—not a court—has authority to decide whether a contract containing an arbitration clause is void *ab initio* in its entirety because one party had no legal authority to enter into it and because its terms are illegal under applicable state law.

PARTIES TO THE PROCEEDING

The parties to the proceedings below were petitioner Patricia Snowden, plaintiffs Karen Dowhite, Sheila Diane Dowhite, Lilistyne Dowhite, Cynthia Powell, Renee Wingo Roberts, and Michael Smith, Sr., respondents CheckPoint Check Cashing and Elite Financial Services, Incorporated, and defendants Unknown Other Persons and Entities.

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The opinion of the U.S. Court of Appeals for the 4th Circuit (App. 1-13) is reported at 290 F.3d 631 (2002). The unreported opinion of the U.S. District Court for the District of Maryland (App. 15-18) was entered on September 7, 2001.

JURISDICTION

The judgment of the court of appeals was entered on May 15, 2002. Pursuant to Rule 13.5 of the Rules of this Court, Rehnquist, C.J. as Circuit Justice, granted Petitioners an extension of time for filing this petition to and including September 12, 2002. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The substantive provision of the Federal Arbitration Act of 1925 ("FAA") at issue, 9 U.S.C. § 2, reads as follows:

> A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable save upon such grounds as exist at law or in equity for the revocation of any contract.

The procedural provision of the FAA at issue, 9 U.S.C. § 4, reads in relevant part as follows:

> A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court which, save for such agreement, would have jurisdiction under Title 28, in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement. . . .The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement. . . .*If the making of the arbitration agreement or the failure, neglect, or refusal to perform the same be in issue, the court shall proceed summarily to the trial thereof.* . . .

(emphasis added)

The state law provisions at issue in the case read as follows:

MD. CODE ANN., FIN. INST. § 11-204. Requirement of license

> (a) Unless a person is licensed by the Commissioner, the person may not:
>
> (1) Make a loan; or
>
> (2) In any way use any advantage provided by the Maryland Consumer Law.

MD. CODE ANN., FIN. INST. § 11-222. Violation of provisions

Any person who violates any provision of § 11-204(a) of this subtitle is guilty of a misdemeanor and on conviction is subject to a fine not exceeding $5,000 or imprisonment not exceeding 3 years or both.

MD. CONST. ART. III, § 57. Legal Rate of Interest

The Legal Rate of Interest shall be Six per cent per annum; unless otherwise provided by the General Assembly.

MD. CODE ANN., COM. LAW § 12-306. Interest

(a)(2) For any loan with an original principal balance of $2,000 or less, the maximum interest rate is:

(i) 2.75% interest per month on that part of the unpaid balance not more than $500;

MD. CODE ANN., COM. LAW § 12-314. Loans for six thousand dollars or less

(b)(1) A loan made in the amount of $6,000 or less, whether or not the loan is or purports to be made under this subtitle, is unenforceable if a rate of interest, charge, discount, or other consideration greater than that authorized by the law of this State is contracted for by any person unless the excess rate contracted for is the result of a clerical error or mistake and the person corrects the error or mistake before any payment is received under the loan.

MD. CODE ANN., COM. LAW § 12-316. Knowing violations

> Any licensee or his officer or employee who knowingly violates any provision of §§ 12-303 through 12-306, § 12-308, § 12-311, § 12-313, or § 12-314 of this subtitle is guilty of a misdemeanor and on conviction is subject to a fine not exceeding $500 or imprisonment not exceeding 6 months or both.

STATEMENT OF THE CASE

This case presents the question of whether, under the FAA, a court or an arbitrator has the authority to decide whether a contract containing an arbitration clause is void *ab initio* in its entirety because one party lacked signatory authority to enter into the contract and because the contract's terms violate applicable state civil and criminal law. A deep split of federal and state appellate authority has emerged on this issue as four federal circuit courts, including the court below, have held that challenges to the existence of a contract must be resolved through arbitration, while three State supreme courts have held that under the FAA only courts may decide these issues because they implicate the very existence of any agreement to arbitrate between the parties.

In *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967), the Court held that a claim of fraud in the inducement of a contract containing an arbitration clause was subject to arbitration because the arbitration provision was severable from the rest of the agreement. *Prima Paint* addressed a contract defense claim that would have rendered the contract voidable, though not automatically void.

The Fourth Circuit below extended *Prima Paint* by holding that an arbitrator must resolve challenges to the formation and existence of a legal contract. Petitioner argued below that

Respondents' entire payday loan contracts, including their arbitration provisions, were void *ab initio* because Respondents were unlicensed to make the loans involved in this case and because the interest rates charged by Respondents rendered the loans illegal and void under applicable state law.

The Fourth Circuit's holding that these claims are subject to arbitration deepens an existing split of authority and directly conflicts with several state supreme court decisions holding that, under the FAA, a court must determine the existence of a contract between the parties before it can order arbitration. This decision also conflicts with the rationale behind the rulings of other federal circuits that courts must resolve allegations that an entire contract is void. Finally, by singling out the arbitration clause to be enforced when the existence and legality of the entire contract is in dispute, the decision below conflicts with this Court's repeated holdings that the FAA does no more than place arbitration agreements on the same footing as other contracts.

A. Factual Background

Petitioner Patricia Snowden entered into her first loan with Respondents at one of Checkpoint Check Cashing's Baltimore locations on June 12, 1999. To obtain $150 cash, Snowden had to submit a check for $180 that would be payable within 14 days, on the date of her next paycheck. These transactions are commonly referred to as "payday loans." Checkpoint deposited the check, and the check cleared. On June 29, 1999, Snowden began to repeat this process, obtaining $200 cash by submitting a check for $240 that was also payable within 14 days on the date of her next paycheck. Checkpoint deposited the check, and the check cleared. Between June 1999 and February 2000, Snowden and Checkpoint engaged in approximately 12 payday

loan or "roll-over" transactions.[1] App. 16. For a borrowed principal that never exceeded $250 at one time and a borrowing period that totaled 168 days, Patricia Snowden paid Checkpoint more than $600 in additional interest costs. As an annual percentage rate, these charges that Snowden paid to Checkpoint totaled more than 500%.[2]

In November 1999, in the midst of these transactions, Checkpoint inserted into its loan documents with Petitioner Snowden a provision requiring arbitration of disputes related to the parties' past and future transactions. App. 16. The provision stated in relevant part as follows:

> 5. Arbitration Provision. Any claim, dispute, or controversy (whether in contract, tort, or otherwise, whether pre-existing, present or future, and including statutory, common law, intentional tort, and equitable claims) arising from or relating to this Agreement or any check or instrument cashed by CheckPoint or fee charged by CheckPoint either prior or

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[1] In roll-over transactions, the borrower extends the existing debt for additional periods of time, and thereby incurs additional charges, due to an inability to make full payment on the original check.

[2] The other plaintiffs who filed suit in this case entered into similar transactions with Checkpoint. Plaintiff Karen Dowhite engaged in approximately 10 payday loan or rollover transactions with Checkpoint at one of its Baltimore locations between April 1999 and February 2000, incurring interest costs of more than 300% APR on a principal that did not exceed $300. Plaintiff Renee Roberts engaged in approximately 15 payday loan or rollover transactions with Checkpoint at one of its Baltimore locations between February 1999 and February 2000, incurring interest costs of more than 300% APR on a principal that did not exceed $400.

> subsequent to this Agreement or the relationships that result from this Agreement (including, to the full extent permitted by applicable law, relationships with third-parties who are not signatories to this Agreement or this Arbitration Provision) or the validity, enforceability, or scope of this Arbitration Provision or the entire Agreement (collectively "Claim"), shall be resolved, upon the election of you or CheckPoint or said third-parties, by binding arbitration pursuant to this Arbitration Provision and the Commercial Arbitration Rules in effect at the time the Claim is filed. A party who has asserted a claim in a lawsuit in court may elect arbitration with respect to any claim(s) subsequently asserted in that lawsuit by any other party or parties. **THERE SHALL BE NO AUTHORITY FOR ANY CLAIMS TO BE ARBITRATED ON A CLASS ACTION BASIS. FURTHER, AN ARBITRATION** [*sic*] **CAN ONLY DECIDE CHECKPOINTS** [*sic*] **OR YOUR CLAIM AND MAY NOT CONSOLIDATE OR JOIN THE CLAIMS OF OTHER PERSONS WHO HAVE SIMILAR CLAIMS.**

Quoted at App. 3-4 (emphasis in original).

The question before the Court is whether this provision is enforceable in light of Petitioner's allegations that Respondents lacked authority under applicable state law to enter into the agreements at issue and that the illegal terms of the agreements render them void and unenforceable in their entirety.

B. The Proceedings Below.

Patricia Snowden, as representative of a putative class of borrowers, filed suit against Respondents on June 26, 2000, in the federal district court for the District of Maryland. The complaint asserted that Checkpoint's payday loan contracts violated the federal Truth in Lending Act (15 U.S.C. §§ 1601 *et seq.*), the Racketeer Influenced and Corrupt Practices Act (18 U.S.C. §§ 1961 *et seq.*), and Maryland's Consumer Loan Act (MD. COM. LAW §§ 301 *et seq.*), Interest and Usury Statute (MD. COM. LAW §§ 101 *et seq.*), and the State's common law of fraud. App. 4-5.

The plaintiff class alleged that Checkpoint was charging and collecting usurious interest for short-term consumer loans under the guise of cashing checks. The complaint alleged that the charges on these payday loans resulted in annual percentage rates of 300 to 400 percent, more than ten to twelve times Maryland's 2.75 percent interest per month (33 percent per annum) usury threshold on small consumer loans.[3] The complaint further alleged that Checkpoint enforced these illegal payments in part by threatening borrowers with criminal prosecution under Maryland's bad check law. Finally, the plaintiffs alleged that Checkpoint was not licensed under the Maryland Consumer Act, and therefore was issuing consumer loans in violation of state law. App. 8.

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[3] These charges are also more than 50 to 60 times the six percent legal rate of interest under Maryland's Constitution if the state's consumer loan laws were found not to apply to the parties' transactions. *See* MD. CONST. ART. III, § 57.

On March 29, 2001, Checkpoint moved the district court to compel arbitration of all of Snowden's claims.[4] Snowden argued in response that the court should rule that Checkpoint's mandatory arbitration clause was unenforceable because the entire payday loan agreement in which it appeared was void *ab initio* as a matter of law. This argument was based on the separate facts that Checkpoint was not licensed in Maryland to make consumer loans, which rendered its contracts illegal and void,[5] and that the loans themselves imposed usurious interest charges, a practice punishable as a crime under Maryland's Consumer Loan Law.[6] *Id.* Snowden further argued that Checkpoint's arbitration clause was itself unconscionable as a contract of adhesion that deprived prevailing plaintiffs of their right to recover attorneys' fees and of the right to proceed on a class-wide basis in any case. *Id.* at 12.

On September 7, 2001, the district court denied Checkpoint's motion to compel arbitration without prejudice. The court noted that Snowden was a named plaintiff in a case where a motion for class certification would be forthcoming, and ruled that it would be inappropriate to order her claims into arbitration before the court determined whether she had any role to play in the pending class action. *Id.* at 17.

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[4] The motion for arbitration applied only to Snowden's claims, and not to those of the other named plaintiffs. *See* App. 15-16 n.1. Snowden is thus the only plaintiff pursuing the appeal that is the subject of this petition.

[5] *See* MD. CODE ANN., FIN. INST. § 11-204(a)(1) (entitled "Requirement of license").

[6] *See* MD. CODE ANN., COM. LAW § 12-314(b)(1) (loan in excess of applicable statutory interest rate is unenforceable); MD. CODE ANN., COM. LAW § 12-316 (imposing criminal sanctions for knowing violation of applicable statutory interest rate).

On May 15, 2002, the Fourth Circuit vacated the district court's order and remanded the case with instructions to grant Checkpoint's motion to compel arbitration against Snowden. The court of appeals held first that the district court's order denying the motion to compel arbitration without prejudice was an appealable order under 9 U.S.C. § 16(a)(1). The court then turned to Snowden's arguments against enforcement of the arbitration clause. App. 6-7.

On this point, the Fourth Circuit held that Snowden's arguments that Checkpoint's unlicensed loan contract was illegal and void must be resolved through arbitration under this Court's holding in *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967). App. 8-9. The court recognized that *Prima Paint* involved claims of fraud in the inducement of a contract, *Id.* at 9, which, unlike Snowden's claims, did not render the entire contract void and therefore did not implicate the making of the arbitration agreement. The court also noted several federal circuit court decisions holding that *Prima Paint's* severability doctrine does not extend to allegations that an entire contract is void. *Id.* at 9-10. Still, the court held that Snowden's allegations must be arbitrated because they did not challenge a party's assent to the underlying contract. *Id.* at 10. Finally, the Fourth Circuit rejected Snowden's argument that the arbitration clause itself was unconscionable, finding that the clause did not attempt to override applicable statutory provisions creating a right for prevailing plaintiffs to recover attorneys' fees and that the arbitration clause's prohibition of class action proceedings was valid because Snowden and other payday loan borrowers from Checkpoint would still be able to obtain legal representation based on the availability of statutory fee awards. *Id.* at 12-13.

REASONS FOR GRANTING THE WRIT

I. There is a Deep Split of Authority on Whether the FAA Authorizes a Court or an Arbitrator to Decide if an Entire Contract is Illegal and Void.

Review is warranted because there is a direct split of authority between the Fourth Circuit's holding below (along with decisions of at least three other federal circuit courts) and the holdings of three State supreme courts as to whether a court or an arbitrator has authority under the FAA to determine whether an underlying contract is void based on a party's lack of signatory authority or based on the contract's illegal terms under applicable state law.

In *Pittsfield Weaving Co., Inc. v. Grove Textiles, Inc.*, 430 A.2d 638 (N.H. 1981), the New Hampshire Supreme Court unanimously refused to enforce an arbitration provision in a contract for the sale of yarn based on its finding that the entire contract was unconscionable. After noting that state contract law rendered any contract deemed unconscionable to be void, the court rejected the defendant's argument that *Prima Paint* required arbitration of the plaintiff's allegations and held that, if the trial court found the entire contract, "*including the arbitration clause*," to be unconscionable, then it could under the FAA properly deny the defendant's motion for arbitration. *Id.* at 639-40 (emphasis in original).

In *Alabama Catalog Sales v. Harris*, 794 So.2d 312 (Ala. 2000), the Alabama Supreme Court held that under the FAA a court, rather than an arbitrator, must determine whether a payday loan contract with an arbitration clause was illegal and void because its usurious interest rate violated the state's Small Loan Act. The court rejected the defendant's argument that

Prima Paint required submission of the plaintiffs' allegations to arbitration, finding instead that *Prima Paint* applies narrowly to arguments that a contract is voidable or subject to revocation, and that the plaintiffs' argument that the payday loan contract was void went to the very existence of an agreement. *Id.* at 315-317; *see also Camaro Trading Co., Ltd. v. Nissei Sanryo America, Ltd.*, 577 So.2d 1274 (Ala. 1991) (holding that court, rather than arbitrator, must determine whether contract containing arbitration clause is illegal and void).[7]

In *Nature's 10 Jewelers v. Gunderson*, 648 N.W.2d 804 (S.D. 2002), decided after issuance of the decision below, the South Dakota Supreme Court held that an arbitration clause in a franchise agreement was unenforceable because the entire agreement was void where the franchisor's registration with the State to operate franchise stores had expired several months before the parties entered into their agreement. Because the franchisor's license to conduct this type of business had previously expired, the South Dakota Supreme Court held that the entire franchise agreement violated the applicable state statute and was void from its inception (not merely voidable at the parties' election). Therefore, the agreement's arbitration provision could not be enforced. The court concluded that it "will not permit the individuals who committed the illegal acts

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[7] At least two intermediate state appellate court decisions have similarly held that a court must resolve allegations that a contract is illegal and void before enforcing the contract's arbitration clause. *See FastFunding the Co., Inc. v. Betts*, 758 So.2d 1143 (Fla. Dist. Ct. App. 2000) (court determines whether consumer loan contract containing arbitration clause is illegal and void in its entirety); *Party Yards, Inc. v. Tempelton*, 751 So.2d 121 (Fla. Dist. Ct. App. 2000) (same).

on behalf of the corporation to benefit from the arbitration clause in the illegal contract." *Id.* at 807.[8]

The decision below and other recent circuit court decisions are directly contrary to these State supreme court holdings. The Fourth Circuit held that, because Snowden's "allegations of usurious interest rates and non-licensure" are not addressed to the arbitration clause itself and do not allege a failure of assent to the entire conract, they could not serve as a basis for the denial of Checkpoint's motion to compel arbitration. App. ##; *see also Burden v. Check into Cash of Kentucky, LLC*, 267 F.3d 483, 490 (6th Cir. 2001), *cert. denied*, 122 S. Ct. 1436 (Apr. 1, 2002) (No. 01-1078) (allegations that payday loan contract is illegal and void *ab initio* under state law due to lender's lack of requisite license and loans' usurious terms must be arbitrated); *Bess v. Check Express*, 294 F.3d 1298, 1305-06 (11th Cir. 2002) (same); *cf. Lawrence v. Comprehensive Business Services Co.*, 833 F.2d 1159 (5th Cir. 1987) (claim that franchise agreement is illegal under state statute is subject to arbitration). These were precisely the types of allegations that served as the basis for the Alabama, South Dakota, and New Hampshire Supreme Courts to deny arbitration motions in cases decided under the FAA. Review is warranted here to resolve this deep split of authority among the federal and state courts of appeal on these recurring questions of federal law.[9]

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[8] Two members of the South Dakota Supreme Court dissented in *Gunderson*. After noting that it was "undisputed" that the FAA provided controlling law in the case, the dissenters proceeded to argue that the claims against the validity of the underlying franchise agreement should be referable to arbitration under *Prima Paint*. *Id.* at 809-10 (Konenkamp, J. dissenting).

[9] This question of federal law under the FAA is certain to arise on a recurring basis in federal and state courts alike because, although the FAA

This split of authority is also reflected in a larger body of cases where federal and state courts of appeal have struggled to define the outer limits of *Prima Paint*'s severability doctrine. Most circuit courts have refused to extend *Prima Paint*'s holding regarding allegations of fraud in the inducement of a contract to the very different type of allegation that the entire contract is void *ab initio* and therefore never came into existence in the first place.[10] These courts have held that this latter type of allegation by definition implicates the "making of the agreement for arbitration," 9 U.S.C. § 4, and therefore must be decided by a court as a precondition to any arbitration order under the FAA.[11] For example, in *Sandvik AB v. Advent Int'l Corp.*, 220 F.3d 99 (3d Cir. 2000) (Becker, J.), the Third Circuit held that a party cannot enforce an arbitration clause while denying that it is bound by the contract containing that clause because, "[e]ven under the severability doctrine [of *Prima Paint*], there may be no arbitration if the agreement to arbitrate is non-existent." *Id.* at 101. The Third Circuit construed *Prima Paint* as applying only to allegations that would render a contract *voidable*, and held that courts must

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creates federal substantive law regarding the enforcement of arbitration agreements, the Act does not create any independent federal-question jurisdiction. *Southland Corp. v. Keating*, 465 U.S. 1, 15 n.9 (1984).

[10] *See, e.g.*, Black's Law Dictionary at 3 (6th ed. 1991) (defining void *ab initio* to mean that agreement "has at no time had any legal validity").

[11] Although this case is governed by Section 3 of the FAA, 9 U.S.C. § 3, rather than Section 4 because the underlying claims were first asserted in court, *Prima Paint* holds that Section 4's requirement for judicial resolution of all issues related to the making of an arbitration agreement also applies in Section 3 proceedings. *Prima Paint*, 388 U.S. at 404.

resolve all allegations that would render an entire contract (and therefore its arbitration clause) *void*:

> Mindful of the doctrine announced in *Prima Paint*, which did not consider a situation in which the *existence* of the underlying contract was at issue, we draw a distinction between contracts that are asserted to be "void" or non-existent, as is contended here, and those that are merely "voidable," as was the contract at issue in *Prima Paint*, for purposes of evaluating whether the making of the arbitration agreement is in dispute.

Id. at 107.[12] The decision below directly conflicts with this rationale underpinning *Sandvik's* holding by requiring arbitration of Snowden's claims that Checkpoint's contract is void, and therefore never came into existence, based on Checkpoint's lack of signatory authority and on its illegal terms.

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[12] *See also Sphere Drake Ins. Ltd. v. All American Ins. Co.*, 256 F.3d 587 (7th Cir. 2001) (court decides whether agent had authority to bind party to contract); *Chastain v. Robinson Humphrey, Inc.*, 957 F.2d 851 (11th Cir. 1992) (court decides allegation that signature to contract was forged); *Three Valleys Municipal Water Dist. v. E.F. Hutton & Co., Inc.*, 925 F.2d 1136, 1140 (9th Cir. 1991) (court decides whether signatory to contract had authority to bind party, limiting *Prima Paint* to "challenges seeking to *avoid* or *rescind* a contract") (emphasis in original); *I.S. Joseph Co., Inc. v. Michigan Sugar Co.*, 803 F.2d 396 (8th Cir. 1986) (court decides whether assignee can enforce contract); *cf. McNally Pittsburgh, Inc. v. Int'l Ass'n of Bridge, Structural & Ornamental Iron Workers*, 812 F.2d 615, 620 (10th Cir. 1987) (in labor relations case, court resolves company's allegation that agent inadvertently signed contract and notes that "[e]ven under the *Prima Paint* construction of the Arbitration Act, a claim that no contractual relation existed between the parties must be resolved before the court can order arbitration).

Federal and state courts of appeal have struggled and come into conflict over where to draw the line between disputes regarding contracts that courts must resolve and those disputes that are referable to arbitration. The court below and several other federal circuits have held that courts may only address disputes over assent to the contract as a whole, and that any other challenge to the existence or legality of the contract must be arbitrated under *Prima Paint*.[13] But other courts hold that courts must decide *any* allegation that would render contract void *ab initio*, including the argument made below that the entire contract is illegal under applicable state law, because a void contract by definition never came into existence and therefore never had an enforceable arbitration clause.[14] By viewing the "making of the agreement for arbitration" under the FAA *solely* as a question of party assent, the former group of cases abrogates a substantial body of state laws, like Maryland's consumer loan statutes, that regulate contract formation in order to advance specific public policy goals. By contrast, the latter group of cases apply to arbitration agreements the same rules of state law that apply to the making of any other contract and

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[13] *See* App. 10; *Burden v. Check into Cash*, 267 F.3d at 490; *Bess v. Check Express*, 294 F.3d at 1305-06; *see also Sphere Drake*, 256 F.3d at 591 (courts must decide claims of lack of agency, forgery, and missing consideration).

[14] *See, e.g., Alabama Catalog Sales v. Harris*, 794 So.2d at 316-17 ("the trial court, as opposed to the arbitrator, must decide the ultimate question relating to the legality and enforceability of the contracts"); *Nature's 10 v. Gunderson*, 648 N.W.2d at 807 ("'A claim that a contract is illegal and, as in this case, criminal in nature is not a matter which can be determined by an arbitrator.'") (quoting *Party Yards, Inc. v. Templeton*, 751 So.2d at 123); *see also Sandvik AB*, 220 F.3d at 107 (in case involving agent's signature authority, holding broadly that *Prima Paint* does not apply to any allegation that a contract is void).

thereby are consistent with the underlying purpose of the FAA to place arbitration agreements on the same footing as other contracts.

The Court therefore should grant review to resolve this split of authority over the scope of *Prima Paint*, to prevent further confusion among the federal and state courts of appeal, and to ensure that arbitration agreements are subject to the same rules of state law that apply to the many different types of contracts in which they are more and more frequently appearing.

II. By Enforcing the Arbitration Clause When the Whole Contract is Alleged to be Illegal and Void, the Decision Below Conflicts with this Court's Holdings that the FAA Places Arbitration Clauses on the Same Footing as Other Contracts.

The decision below is also in conflict with this Court's repeated holdings that federal policy regarding arbitration is simply one of enforcing contracts and that the FAA does no more or less than place arbitration agreements on the same footing as other agreements. Earlier this year, the Court refused to enforce an arbitration provision in an employment contract in a case where claims were asserted by a federal agency that was not a party to that contract. *See Equal Employment Opportunity Comm'n v. Waffle House, Inc.*, 122 S. Ct. 754 (2002). In holding that the FAA's policies regarding arbitration do not overcome the requirement of an agreement between the parties to a dispute, the Court explained that the purpose of the Act was simply to "'reverse the longstanding judicial hostility to arbitration agreements that had existed at English common law and had been adopted by American courts, *and to place arbitration agreements on the same footing as other contracts.*'" *Id.* at 761 (quoting *Gilmer v. Interstate/Johnson*

Lane Corp., 500 U.S. 20, 24 (1991)) (emphasis added). In so holding, this Court reaffirmed that courts must apply the same rules of contract law to arbitration agreements as apply to all other contractual provisions.

Similarly, in *Doctor's Associates, Inc. v. Casarotto*, 517 U.S. 681 (1996), this Court held that the FAA preempted a state statute that imposed specific disclosure requirements applicable only to arbitration agreements. The Court echoed its earlier decisions in explaining that, through the FAA, "Congress precluded states from singling out arbitration provisions for suspect status, requiring instead that such provisions be placed upon the same footing as other contracts." *Id.* at 687 (internal quotation omitted). In an earlier decision involving FAA preemption, the Court elaborated on the fact that the FAA does no more than place arbitration clauses on the same footing as other contracts and contractual provisions:

> States may regulate contracts, including arbitration clauses, under general contract law principles and they may invalidate an arbitration clause 'upon such grounds as exist at law or in equity for the revocation of *any* contract.' 9 U.S.C. § 2 (emphasis added). What states may not do is decide that a contract is fair enough to enforce all its basic terms (price, service, credit), but not fair enough to enforce its arbitration clause. The Act makes any such state policy unlawful, for that kind of policy would place arbitration clauses on an unequal 'footing,' directly contrary to the Act's language and Congress' intent.

Allied-Bruce Terminix Co., Inc. v. Dobson, 513 U.S. 265, 281 (1995).

Snowden's allegations challenging the legality of Checkpoint's payday loan contracts in their entirety present the inverse of what the Court hypothesized in *Allied-Bruce Terminix*. Snowden alleges that Checkpoint had no authority to make these contracts under Maryland law because it was not licensed to make consumer loans. App. 8. Snowden further alleges that Checkpoint's excessive interest rates render the entire loan contracts void *ab initio* under Maryland's consumer loan and usury laws. *Id.* The Fourth Circuit held that the arbitration provision of this allegedly illegal and void contract must be singled out and given effect before there is a determination as to whether all of the contract (including the arbitration clause) was legally formed. *Id.* at 8-10. This is not an application of ordinary contract law and this does not place the arbitration clause on the same footing as the other provisions of Checkpoint's payday loan contract. Instead, this ruling misapplies the FAA to require arbitration where the basic question of whether there was ever a legal contract between the parties, and therefore whether there was ever an arbitration agreement, is still in dispute.

In short, by extending *Prima Paint* to require enforcement of an arbitration clause when the entire contract in which it appears is alleged to be illegal and void, the decision below conflicts with this Court's repeated interpretations of the FAA. In light of this conflict and because the decision below deepens an already substantial split of authority among federal and state appellate courts on the question of whether the FAA requires enforcement of an arbitration provision in an allegedly illegal and void contract, the Court should grant review and resolve these conflicts on this important question of federal law.

CONCLUSION

The petition for a writ of *certiorari* should be granted.

Respectfully submitted,

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Date: September 12, 2002

PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

PATRICIA SNOWDEN,
Plaintiff-Appellee,
and
KAREN DOWHITE; SHEILA DIANE
DOWHITE; LILISTYNE DOWHITE;
CYNTHIA POWELL; RENEE WINGO
ROBERTS; MICHAEL SMITH, SR.,
Plaintiffs,

No. 01-2149

v.

CHECKPOINT CHECK CASHING; ELITE
FINANCIAL SERVICES, INCORPORATED,
Defendants-Appellants,
and
UNKNOWN OTHER PERSONS AND
ENTITIES,
Defendants.

Appeal from the United States District Court
for the District of Maryland, at Baltimore.
Andre M. Davis, District Judge.
(CA-00-1945-AMD)
Argued: February 26, 2002
Decided: May 15, 2002
Before NIEMEYER, Circuit Judge,
HAMILTON, Senior Circuit Judge, and
Raymond A. JACKSON, United States District Judge for the
Eastern District of Virginia, sitting by designation.

Vacated and remanded by published opinion. Senior Judge Hamilton wrote the opinion, in which Judge Niemeyer and Judge Jackson joined.

COUNSEL

ARGUED: William Willis Carrier, III, TYDINGS & ROSENBERG, L.L.P., Baltimore, Maryland, for Appellants. John Thomas Ward, WARD, KERSHAW & MINTON, P.A., Baltimore, Maryland, for Appellee. **ON BRIEF:** Ann M. Grillo, TYDINGS & ROSENBERG, L.L.P., Baltimore, Maryland, for Appellants. Richard A. Fisher, LOGAN, THOMPSON, MILLER, BILBO, THOMPSON & FISHER, P.C., Cleveland, Tennessee, for Appellee.

OPINION

HAMILTON, Senior Circuit Judge:

In this interlocutory appeal, Elite Financial Services, Inc. (Elite) challenges the district court's denial of its motion to compel arbitration of, and stay proceedings with respect to, various federal and Maryland state law claims lodged against it by Patricia Snowden (Snowden), one of Elite's deferred deposit transaction customers. For reasons that follow, we vacate the district court's order denying Elite's motion to compel arbitration and stay proceedings and remand with instructions.

I.

During the period between June 12, 1999 and February 7, 2000, Snowden, a Maryland citizen, engaged in twelve so-called "deferred deposit" transactions at stores owned and operated by Elite.[1] In a deferred deposit transaction, a customer tenders a

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[1]Elite operated the stores under the trade name "CheckPoint Check Cashing" (CheckPoint).

check to the store that is cashed for a service fee with the understanding that the check will not be negotiated until some later, agreed upon time.

Of the twelve deferred deposit transactions in which Snowden engaged, only the November 4, 1999 agreement memorializing the sixth deferred deposit transaction contained an arbitration provision. From this point forward, we will refer to this agreement in its entirety as "the November 4, 1999 Agreement." Of relevance in the present appeal, the November 4, 1999 Agreement provided that Snowden and Elite (t/a CheckPoint) mutually agreed that either party had the right to elect to resolve by binding arbitration:

> [a]ny claim, dispute, or controversy (whether in contract, tort, or otherwise, whether pre-existing, present or future, and including statutory, common law, intentional tort, and equitable claims) arising from or relating to this Agreement or any check or instrument cashed by CheckPoint or fee charged by CheckPoint either prior or subsequent to the date of this Agreement . . . .

(J.A. 54). Pursuant to the November 4, 1999 Agreement, the parties also mutually agreed that: (1) "[i]f arbitration is chosen, it will be conducted with the American Arbitration Association (the "AAA") pursuant to the AAA's Commercial Arbitration Rules"; (2) "THERE SHALL BE NO AUTHORITY FOR ANY CLAIMS TO BE ARBITRATED ON A CLASS ACTION BASIS"; (3) "AN ARBITRATION CAN ONLY DECIDE CHECKPOINT[']S OR YOUR CLAIM AND MAY NOT CONSOLIDATE OR JOIN THE CLAIMS OF OTHER PERSONS WHO MAY HAVE SIMILAR CLAIMS"; (4) any "participatory arbitration hearing . . . will take place in the federal judicial district" of Snowden's residence; (5) Elite "will advance the first $50 of the filing and hearing fees for any claim in connection with the

arbitration"; and (6) "[t]his arbitration agreement is made pursuant to a transaction involving interstate commerce, and shall be governed by the Federal Arbitration Act ("FAA"), 9 U.S.C. Sections 1-16." *Id.* From this point forward, we will refer to all of the language in the November 4, 1999 Agreement pertaining to the subject of arbitration as the "Arbitration Agreement."

The substantive provisions of the FAA that are relevant in the present appeal are sections 2, 3, and 4. 9 U.S.C. §§ 2-4. Section 2 of the FAA provides that a written provision for arbitration "in any maritime transaction or a contract evidencing a transaction involving commerce . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. Section 3 of the FAA requires the federal district court in which the action is brought, "upon any issue referable to arbitration under an agreement in writing for such arbitration," to "stay the trial of the action" pending arbitration once it is satisfied that the issue is arbitrable under the agreement. *Id.* § 3. Finally, section 4 directs the federal district court to order arbitration once it is satisfied that an agreement for arbitration has been made and has not been honored.

On June 26, 2000, Snowden, Karen Dowhite, Sheila Dowhite, Lilistyne Dowhite, Cynthia Powell, Renee Roberts, and Michael Smith, Sr. (collectively the Plaintiffs) filed a purported class action suit in the United States District Court for the District of Maryland against Elite.[2] The essential allegations of the complaint

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[2]The Plaintiffs also named CheckPoint as a defendant. As previously explained, CheckPoint is merely a trade name for Elite. As such, CheckPoint is not a separate legal entity capable of being sued. *See Bauer v. Pounds*, 762 A.2d 499, 503 (Conn. App. Ct. 2000) ("It appears well settled that the use of a fictitious or assumed business name does not create a separate legal entity and that the designation d/b/a is merely descriptive of the person or corporation who does business under some

are: (1) that the Plaintiffs' deferred deposit transactions with Elite were loans; and (2) that the service fee charged by Elite for such transactions constituted interest. Based on these allegations, the Plaintiffs asserted various state and federal claims, including but not limited to claims alleging violation of the Truth in Lending Act (TILA), 15 U.S.C. §§ 1601-93, violation of the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. § 1962(c), violation of the Maryland Consumer Protection Act, Md. Code Ann., Commercial Law II § 13-408 (2000), and fraud under Maryland common law.

Elite subsequently moved to compel arbitration of all of Snowden's claims and to stay proceedings in the district court with respect to those claims, or in the alternative, to dismiss all of Snowden's claims (Elite's Motion to Compel Arbitration/Stay Proceedings).[3] The district court denied the motion without prejudice. In so doing, the district court operated under the belief that the issue of the enforceability of the Arbitration Agreement

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other name.") (internal quotation marks, ellipses, and alterations omitted); *American Express Travel Related Servs. Co. v. Berlye*, 414 S.E.2d 499, 501 (Ga. Ct. App. 1991) ("The use of d/b/a or 'doing business as' to associate a tradename with the corporation using it does not create a legal entity separate from the corporation but is merely descriptive of the corporation."); 8 *Fletcher Cyclopedia of the Law of Private Corporations* § 3831 (revised ed. 1992 & Supp. 1999) ("[U]sing d/b/a or 'doing business as' to associate an assumed or fictitious name with a corporation does not, without more, create a separate legal entity different from the corporation."). For purposes of this opinion, we treat Elite as the sole defendant.

[3]According to the district court, of all of the Plaintiffs, only Snowden had executed an agreement with Elite containing an arbitration provision. Moreover, we note that Elite's Motion to Compel Arbitration/Stay Proceedings did not seek to stay any proceedings with respect to any claims by the other plaintiffs.

was inextricably intertwined with the issue of Snowden's suitability as a class representative. The district court stated its intention to revisit its decision to deny Elite's Motion to Compel Arbitration/Stay Proceedings at the time that it decided whether to certify the case as a class action.

Elite noted a timely appeal of the district court's denial of its Motion to Compel Arbitration/Stay Proceedings with respect to Snowden's claims. This is the appeal that is now before us.

II.

Although Snowden makes no challenge to our appellate jurisdiction, the fact that the district court not only denied Elite's Motion to Compel Arbitration/Stay Proceedings without prejudice, but also stated its intention to revisit the ruling at a later time triggered alarm bells of a premature appeal for our consideration. Significantly, when our appellate jurisdiction is in doubt, we must *sua sponte* raise and address the matter. *Lee v. Wetzel*, 244 F.3d 370, 373 (5th Cir. 2001) (federal appellate court must always be sure of its appellate jurisdiction and, if there is doubt, must address the jurisdictional issue *sua sponte* if necessary); *Braswell Shipyards, Inc. v. Beazer East, Inc.*, F.3d 1331, 1336 (4th Cir. 1993) (federal appellate court is compelled to raise *sua sponte* the issue of whether the district court properly certified for immediate appeal a judgment entered on less than all of parties' claims, and if certification was unwarranted, then appeal must be dismissed).

Having considered the relevant statutory language, we are fully satisfied that we possess appellate jurisdiction. Under 9 U.S.C. § 16(a)(1)(A)-(B), the FAA expressly permits an immediate appellate challenge to a district court's denial of a motion to compel arbitration and stay proceedings pending the outcome of arbitration. *Id.* ("An appeal may be taken from—(1) an order—(A)

refusing a stay of any action under section 3 of this title, (B) denying a petition under section 4 of this title to order arbitration to proceed . . . ."); *Brown & Root, Inc. v. Breckenridge*, 211 F.3d 194, 202 (4th Cir. 2000) (citing 9 U.S.C. § 16(a)(1)(B) and stating that § 16 "provides for immediate appeal of an order denying a § 4 petition to compel arbitration"). Here, the record unequivocally reflects that the district court entered an order denying Elite's Motion to Compel Arbitration/Stay Proceedings. Under the plain language of § 16(a)(1)(A)-(B) of the FAA, this circumstance is all that is necessary to grant us appellate jurisdiction in this case. We note that our sister circuits have reached the same conclusion in materially similar situations. *Sandvik AB v. Advent Int'l Corp.*, 220 F.3d 99, 102-04 (3d Cir. 2000) (holding district court's order denying motion to compel arbitration was immediately appealable under § 16(a) of the FAA, even though district court stated that it would have to determine whether there was an actual agreement to arbitrate); *Koveleskie v. SPC Capital Markets, Inc.*, 167 F.3d 361, 363 (7th Cir. 1999) (holding that, despite the district court's declaration of a need for discovery before it could decide arbitration issue, there was no doubt that motion to compel arbitration was denied, and was thus immediately appealable under § 16(a) of the FAA). Having satisfied ourselves that we possess appellate jurisdiction, we now proceed to consider the merits of Elite's appeal.

III.

According to Elite, the Arbitration Agreement contractually obligates Snowden to arbitrate all of her claims in the present action, and the FAA required that the district court grant its Motion to Compel Arbitration/Stay Proceedings. In response, Snowden does not dispute that the Arbitration Agreement falls within the scope of the FAA. Nor does she dispute that her claims fall within the scope of the Arbitration Agreement. Rather, Snowden seeks to uphold the district court's denial of Elite's

Motion to Compel Arbitration/Stay Proceedings by attacking the validity of the November 4, 1999 Agreement on two grounds and by attacking the validity of the Arbitration Agreement on three grounds.

Snowden first attacks the validity of the November 4, 1999 Agreement on the ground that the deferred deposit transaction memorialized by that agreement is void *ab initio* under Maryland law for imposition of a usurious rate of interest. Snowden's second attack on the validity of the November 4, 1999 Agreement rests upon her allegation that Maryland law required Elite to be state licensed as a money lender (which she alleges it was not) in order to engage in deferred deposit transactions. She argues that if the November 4, 1999 Agreement is void *ab initio* for either or both of these grounds, then the Arbitration Agreement, as part of the November 4, 1999 Agreement, is also void *ab initio*.

Neither of these two grounds is a viable basis upon which this court may affirm the district court's denial of Elite's Motion to Compel Arbitration/Stay Proceedings. The law is well settled in this circuit that, if a party seeks to avoid arbitration and/or a stay of federal court proceedings pending the outcome of arbitration by challenging the validity or enforceability of an arbitration provision on any grounds that "exist at law or in equity for the revocation of any contract," 9 U.S.C. § 2, the grounds "must relate specifically to the arbitration clause and not just to the contract as a whole." *Hooters of Am., Inc. v. Phillips*, 173 F.3d 933, 938 (4th Cir. 1999). *See also Jeske v. Brooks*, 875 F.2d 71, 75 (4th Cir. 1989) (refusing to consider party's arguments that arbitration clause must be declared invalid on grounds that customer's agreement as a whole was invalid due to overreaching, unconscionability, fraud, and lack of consideration, because the alleged defects pertained to the entire contract, rather than specifically to the arbitration clause).

This rule is derived from the Supreme Court's opinion in *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967). In *Prima Paint*, the Supreme Court held that a claim of fraud in the inducement of the entire contract at issue was arbitrable under a broad arbitration clause. *Id.* at 403-04. The Court held that section 4 of the FAA, and by implication section 3 of the FAA, limits a federal court's jurisdiction to challenges to the arbitration clause itself:

> Under § 4, with respect to a matter within the jurisdiction of the federal courts save for the existence of an arbitration clause, the federal court is instructed to order arbitration to proceed once it is satisfied that "the making of the agreement for arbitration or the failure to comply (with the arbitration agreement) is not in issue." Accordingly, if the claim is fraud in the inducement of the arbitration clause itself—an issue which goes to the "making" of the agreement to arbitrate—the federal court may proceed to adjudicate it. But the statutory language does not permit the federal court to consider claims of fraud in the inducement of the contract generally . . . . We hold, therefore, that in passing upon a § 3 application for a stay while the parties arbitrate, a federal court may consider only issues relating to the making and performance of the agreement to arbitrate.

Id. at 403-04 (internal footnotes omitted). This holding in *Prima Paint* has come to be known as the severability doctrine. *See, e.g., Sandvik AB*, 220 F.3d at 105.

Notably, the severability doctrine has been held not to apply when the party seeking to avoid arbitration contends that it never assented in the first place to the contract containing the arbitration provision. *See, e.g., Sphere Drake Ins., Ltd. v. All Am. Ins. Co.*, 256 F.3d 587, 590-91 (7th Cir. 2001) (district court should

determine whether signatory had power to bind company to contract containing arbitration agreement); *Sandvik AB*, 220 F.3d at 110 (district court should determine whether signatory had power to bind company to contract containing arbitration agreement); *Chastain v. Robinson-Humphrey Co.*, 957 F.2d 851, 854 (11th Cir. 1992) (district court should determine whether signatory had power to bind family member to contract containing arbitration agreement). The federal appellate courts reaching these holdings logically reasoned that if a party never assented to the overall contract containing the arbitration provision, then the party never assented to the arbitration provision. *Id.* The question of whether a valid agreement to arbitrate exists being an issue for the district court, the district court is required to decide the assent issue even though the issue goes to the making of the entire agreement. *Sphere Drake Ins., Ltd.*, 256 F.3d at 590-91; *Sandvik AB*, 220 F.3d at 107; *Chastain*, 957 F.2d at 854.

Here, Snowden's allegations of usurious rates of interest and nonlicensure do not relate specifically to the Arbitration Agreement. Neither do they underlie a claim that Snowden failed to assent to the terms of the November 4, 1999 Agreement. Therefore, they cannot serve as a basis to uphold the district court's denial of Elite's Motion to Compel Arbitration/Stay Proceedings.

We note that our conclusion is squarely in accord with the Sixth Circuit's recent and well-reasoned decision in *Burden v. Check Into Cash of Kentucky, LLC*, 267 F.3d 483 (6th Cir. 2001). In that case, the Sixth Circuit rejected the same void *ab initio* arguments that Snowden presses in the present appeal. Specifically, the Sixth Circuit held that the plaintiffs in that case (who had brought the action against a check cashing company and its majority owner alleging violations of federal and Kentucky law arising from deferred deposit transactions almost identical to those at issue in the present case) could not avoid arbitration by reason

of their allegations that the customer agreements containing the arbitration provisions were void *ab initio* under Kentucky law for requiring usurious rates of interest and/or because the defendant company did not hold a Kentucky license to lend money.[4] *Id.* at 489. In so doing, the Sixth Circuit first observed that the plaintiffs' allegations concerned the substance of the entire customer agreements rather than their failure to assent to such agreements or their own lack of signatory power. *Id.* at 490. Second, the court observed a distinction between entering into a loan agreement with an unlicenced lender and not assenting to a loan agreement at all. *Id.* Based upon these observations, the court vacated the district court's denial of the defendants' motion to compel arbitration and remanded the case to the district court for consideration in the first instance of the plaintiffs' other allegations that specifically challenged the enforceability of the arbitration provisions. *Id.* at 493. In sum, *Burden* supports our conclusion that Snowden's allegations of usurious rates of interest and non-licensure cannot serve as a basis to uphold the district court's denial of Elite's Motion to Compel Arbitration/ Stay Proceedings.

We next address Snowden's allegations that pertain specifically to the Arbitration Agreement. In this regard, Snowden first argues that the Arbitration Agreement itself is unenforceable because it does not include an express jury waiver provision. Without an express jury waiver provision, Snowden reasons that she could not have knowingly and voluntarily waived her Seventh Amendment right to a jury trial. Common sense dictates that we reject this argument. "[T]he loss of the right to a jury trial is a necessary and fairly obvious consequence of an agreement to arbitrate." *Syndor v. Conseco Fin. Servs. Corp.*, 252 F.3d 302, 307 (4th Cir. 2001) (internal quotation marks omitted).

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[4]The district court in *Burden* had denied the defendants' motion to compel arbitration solely on the ground that the plaintiffs had alleged void *ab initio* contracts. *Id.* at 493.

We also reject Snowden's argument that the Arbitration Agreement is unenforceable as unconscionable because without the class action vehicle, she will be unable to maintain her legal representation given the small amount of her individual damages. Snowden's argument is unfounded in light of: (1) the fact that attorney's fees are recoverable by a prevailing plaintiff in a TILA action, 15 U.S.C. § 1640(a)(3), and a civil RICO action, 18 U.S.C. § 1962(c); and (2) the fact that, although the Arbitration Agreement provides that each party shall bear the expense of their respective attorneys' fees regardless of which party prevails in the arbitration, such provision expressly does not apply if it is "inconsistent with the applicable law . . . ." (J.A. 54). *Johnson v. West Suburban Bank*, 225 F.3d 366, 374 (3d Cir. 2000), *cert. denied sub nom. Johnson v. Tele-Cash, Inc.*, 531 U.S. 1145 (2001) ("Attorneys' fees are recoverable under the TILA, see 15 U.S.C. § 1640(a)(3), and would therefore appear to be recoverable in arbitration, as arbitrators possess the power to fashion the same relief as courts.").

Finally, we reject as meritless Snowden's unsupported argument that forcing consumers like her to arbitrate consumer protection claims against companies like Elite is against public policy relating to consumer protection. Congress enacted the FAA in 1925 in order "to reverse the longstanding judicial hostility to arbitration agreements that had existed at English common law and had been adopted by American courts, and to place arbitration agreements upon the same footing as other contracts." *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24 (1991). Snowden has presented no authority or evidence establishing that the arbitral forum contemplated by the FAA and provided in the Arbitration Agreement is inconsistent with public policy relating to consumer protection. Indeed, we have recognized the arbitral forum specified by the Arbitration Agreement as one provided by a reputable arbitration organization. *Hooters*, 173 F.3d at 939. We also note that the Arbitration Agreement places no limitations

upon the substantive remedies available to Snowden in arbitration. In sum, we can discern no violation of public policy relating to consumer protection by requiring Snowden to resolve her claims against Elite in the arbitral forum.

As there is no dispute that Snowden's claims fall within the scope of the Arbitration Agreement or that the Arbitration Agreement falls within the scope of the FAA, and Snowden has failed to show sufficient justification for this court to hold the Arbitration Agreement unenforceable, we vacate the district court's order denying Elite's Motion to Compel Arbitration/Stay Proceedings and remand with instructions to grant the motion to the extent it seeks to compel arbitration of Snowden's claims and stay proceedings with respect thereto pending the outcome of such arbitration.

VACATED AND REMANDED

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Karen Dowhite, et al.	:	
Plaintiffs,	:	
	:	
	:	CIVIL NO. AMD 00-1945
	:	
v.	:	
:		
CHECKPOINT CHECK	:	
CASHING, et al.	:	
Defendants.	:	

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MEMORANDUM

This is another in a series of cases on my docket in which named plaintiffs purporting to represent a class of Maryland consumers have instituted claims under federal and state law based on the defendants' allegedly unlawful practices in respect to certain "payday loan" or "deferred presentment" transactions, as a component of defendants' check cashing enterprise. There has been a veritable flood of such cases in federal and state courts in the last five years. *See generally* Scott Andrew Schaaf, *From Checks to Cash: The Regulation of the Payday Lending Industry*, 5 N.C. Banking Inst. 339 (April 2001). Defendants, Checkpoint Check Cashing, Incorporated and Elite Financial Services, Inc., have renewed their motion to compel arbitration and stay proceedings (as to plaintiff Patricia Snowden) pursuant to the Federal Arbitration Act, 9 U.S.C. § 3, or in the alternative, to dismiss.[1]

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[1]The motion is asserted with respect to Patricia Snowden only, but defendants indicate that they expect to raise the issue of arbitration more generally when the class certification issues are ripe. It is not at all clear to me why the existence of arbitration provisions binding on some persons

Snowden is one of numerous named plaintiff in what is manifestly a class action complaint. She is engaged in approximately 12 payday loans or "roll-over" transactions with defendants between June 1999 and February 2000. Compl. ¶ 68. These transactions occurred on the following dates: June 12, 1999; June 29, 1999; August 18, 1999; September 5, 1999;[2] October 22, 1999; November 4, 1999; November 18, 1999; December 30, 1999; January 12, 2000; January 25, 2000; and February 7, 2000. Compl ¶¶ 69-92. One of these transactions, a provision for arbitration was contained only in the agreement memorializing the transaction completed on November 4, 1999. This provision purports to operate both retrospectively and prospectively as to require Snowden to arbitrate any and all claims arising out of any and all such transactions at any time. Thus, defendants move the court to compel arbitration of claims arising from all transactions entered into by Snowden based on her execution of so-called Customer Agreement containing an arbitration provision on this one occasion.

Defendants apparently filed a Demand for Arbitration with the American Arbitration Association on August 1, 2000, but for the most of the last year since they did so, the parties have been engaged in settlement discussions. When those negotiations ended without success, preliminary motions practice began in earnest, of which the instant motion is an additional installment.

There is considerable legal support for the enforceability of the arbitration provision at issue in this case. Indeed, taking their lead from the Supreme Court, as of course they must, the courts of appeals, and in turn federal trial courts, have in recent years crafted from the Federal Arbitration Act interpretations and constructions

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should preclude a class certification as to others, but that issue is not presented by the pending motion.

[2]Plaintiffs indicate that another transaction occurred in September, but have not provided the date. Compl. ¶77.

that have turned that statute into a tsunami, which has washed away constitutional and statutory protection clearly intended by Congress to afford important protections to the tangible and intangible rights of broad classes of persons. Snowden has made every imaginable argument in her effort to avoid the effect of the arbitration provision: (1) adhesion contract; (2) unconscionability; (3) improper waiver of class action status for Truth in Lending Act claims, together with improper waiver of the right to recover attorney's fees as a prevailing plaintiff thereunder; (4) involuntary waiver of the right to a jury trial; (5) improper retroactivity; and (6) illegality of the contract providing for the underlying financial transactions, i.e., an assertion that the agreement pursuant to which the transactions were effected was void *ab initio*" under state law.

I am satisfied that there is no compelling reason (or even good reason) to decide now whether, in a class action case with numerous named plaintiffs, only one of whom has executed an agreement containing an arbitration provision, that provision is enforceable. To the contrary, there will be time and opportunity enough, during the briefing on the upcoming motion for class certification, to determine whether Snowden has any role to play in this action or whether, instead, her sole remedy lies in an arbitral forum. Indeed, the issue of her suitability as a class representative is ineluctably bound up with the issue of the enforceability of the arbitration provision which she, alone among the named plaintiffs, executed. Accordingly the motion shall be denied without prejudice and discovery on class certification issues shall proceed. An Order Follows.

Filed: September 7, 2001 s/

ANDRE M. DAVIS
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Karen Dowhite, et al.	:	
Plaintiffs,	:	
	:	
	:	CIVIL NO. AMD 00-1945
	:	
v.	:	
:		
CHECKPOINT CHECK	:	
CASHING, et al.	:	
Defendants.	:	

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ORDER

For reasons set forth in the foregoing Memorandum, it is the 7th day of September, 2001, by the United States District Court for the District of Maryland, ORDERED

(1) That Defendants' Motion to Compel Arbitration and Stay Proceedings of Patricia Snowden, or, in the Alternative, to Dismiss (Paper No. 24) is DENIED WITHOUT PREJUDICE; and it is further ORDERED

(2) That THE PARTIES SHALL CONDUCT DISCOVERY ON CLASS CERTIFICATION ISSUES AND PLAINTIFFS SHALL FILE THEIR MOTION FOR CLASS CERTIFICATION ON OR BEFORE JANUARY 29, 2002, and it is further ORDERED

(3) That the Clerk shall TRANSMIT a copies [sic] of this Order and the foregoing Memorandum to the attorneys of record.

s/
ANDRE M. DAVIS
UNITED STATES DISTRICT JUDGE

Supreme Court, U.S.
FILED
OCT 17 2002
OFFICE OF THE CLERK

No. 02-424

IN THE

Supreme Court of the United States

PATRICIA SNOWDEN,
Petitioner,

and

KAREN DOWHITE, SHEILA DIANE DOWHITE, LILISTYNE DOWHITE, RENEE WINGO ROBERTS, AND MICHAEL SMITH, SR.,
Plaintiffs,

v.

ELITE FINANCIAL SERVICES, INC. D/B/A CHECKPOINT CHECK CASHING,
Respondent,

and

UNKNOWN OTHER PERSONS AND ENTITIES,
Defendants.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the United States Court of Appeals for the Fourth Circuit erred by holding that, under the Federal Arbitration Act, 9 U.S.C. § 1 *et seq.* ("FAA"), and this Court's holding in *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967), a party cannot avoid arbitration by claiming that the contract containing the arbitration agreement is void *ab initio*.

CORPORATE DISCLOSURE STATEMENT

Elite Financial Services, Inc. d/b/a CheckPoint Check Cashing has no parent company, and no publicly held company owns ten percent or more of Elite Financial Services, Inc.'s stock.

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IN THE

Supreme Court of the United States

No. 02-424

PATRICIA SNOWDEN,
Petitioner,

and

KAREN DOWHITE, SHEILA DIANE DOWHITE, LILISTYNE DOWHITE, RENEE WINGO ROBERTS, AND MICHAEL SMITH, SR.,
Plaintiffs,

v.

ELITE FINANCIAL SERVICES, INC. D/B/A CHECKPOINT CHECK CASHING,
Respondent,

and

UNKNOWN OTHER PERSONS AND ENTITIES,
Defendants.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

STATEMENT OF THE CASE

On June 26, 2000, Petitioner Snowden, and Plaintiffs Karen Dowhite, Sheila Diane Dowhite, Lilistyne Dowhite, Renee Wingo Roberts, and Michael Smith, Sr. (collectively "Plaintiffs") filed a purported class action lawsuit in the United States District Court for the District of Maryland

against Elite Financial Services, Inc. d/b/a CheckPoint Check Cashing ("Elite"). Plaintiffs alleged that the deferred deposit check cashing services offered by Elite were loans and that the service fee charged in connection with the deferred deposit transactions constituted usurious interest. Plaintiffs asserted claims against Elite under (1) the federal Truth in Lending Act, 15 U.S.C. § 1601 *et seq.* ("TILA"); (2) MD. CODE ANN., COM. LAW §§12-106 and 12-108; (3) Maryland's Interest and Usury Statutes, MD. CODE ANN., COM. LAW § 12-101 *et seq.*; (4) Maryland's Consumer Loan Law, MD. CODE ANN., COM. LAW § 12-301 *et seq.*; (5) the federal Racketeering Influenced and Corrupt Organizations Act, 18 U.S.C. § 1961 *et seq.* ("RICO"); (6) the Maryland Consumer Protection Act, MD. CODE ANN., COM. LAW § 13-101 *et seq.*; and (7) common law fraud.

According to Plaintiffs' Complaint, from June 1999 through February 2000, Petitioner conducted twelve deferred deposit check cashing transactions with Elite, including a transaction dated November 4, 1999. As part of her November 4, 1999 transaction, Petitioner entered into a Customer Agreement with Elite, which included an Arbitration Agreement stating as follows:

> 4. *Arbitration Disclosure.* You agree that if a dispute of any kind arises out of this Agreement, any instrument cashed pursuant thereto, or any check or instrument cashed by CheckPoint or fee charged by CheckPoint either prior or subsequent to the date of this Agreement, then either you or CheckPoint or third-parties involved can choose to have that dispute resolved by binding arbitration as set forth in Paragraph 5 below. If arbitration is chosen, it will be conducted with the American Arbitration Association (the "AAA") pursuant to the AAA's Commercial Arbitration Rules.
>
> 5. *Arbitration Provision.* Any claim, dispute or controversy (whether in contract, tort, or otherwise, whether

pre-existing, present or future, and including statutory, common law, intentional tort, and equitable claims) arising from or relating to this Agreement or any check or instrument cashed by CheckPoint or fee charged by CheckPoint either prior or subsequent to the date of this Agreement, or advertisements, promotions, or oral or written statements relating to this Agreement or the relationships that result from this Agreement (including, to the full extent permitted by applicable law, relationships with third-parties who are not signatories to this Agreement or this Arbitration Provision) or the validity, enforceability, or scope of this Arbitration Provision or the entire Agreement (collectively "Claim"), shall be resolved, upon the election of you or CheckPoint or said third-parties, by binding arbitration pursuant to this Arbitration Provision and the Commercial Arbitration Rules in effect at the time the Claim is filed. A party who has asserted a claim in a lawsuit in court may elect arbitration with respect to any claim(s) subsequently asserted in that lawsuit by any other party or parties. THERE SHALL BE NO AUTHORITY FOR ANY CLAIMS TO BE ARBITRATED ON A CLASS ACTION BASIS. FURTHER, AN ARBITRATION CAN ONLY DECIDE CHECKPOINTS OR YOUR CLAIM AND MAY NOT CONSOLIDATE OR JOIN THE CLAIMS OF OTHER PERSONS WHO HAVE SIMILAR CLAIMS. Any participatory arbitration hearing that you attend will take place in the federal judicial district of your residence. At your written request, we will advance the first $50 of the filing and hearing fees for any claim which you may file against us. The arbitrator will decide whether we or you will ultimately be responsible for paying any fees in connection with the arbitration. Unless inconsistent with the applicable law, each party shall bear the expense of their respective attorneys', experts' and witness fees, regardless of which party prevails in the arbitration.

> This arbitration agreement is made pursuant to a transaction involving interstate commence [sic], and shall be governed by the Federal Arbitration Act ("FAA"), 9 U.S.C. Sections 1-16. The arbitrator shall apply applicable substantive law consistent with the FAA and applicable statutes of limitations and shall honor claims of privilege recognized by law. Judgment upon the award rendered by the arbitrator may be entered in any court having jurisdiction. The Arbitration Provision shall survive satisfaction of your contractual obligations and termination of this Agreement. If any portion of this Arbitration Provision is deemed invalid or unenforceable under the FAA, should not invalidate the remaining portions of this Arbitration Provision.

Customer Agreement dated November 4, 1999 (JA 54).

Pursuant to this Arbitration Agreement, Elite moved the district court to compel Petitioner's claims against it to arbitration. The district court denied this motion without prejudice, whereupon Elite appealed to the Fourth Circuit. The Fourth Circuit reversed. Relying on this Court's decision in *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967), the Fourth Circuit concluded that because Petitioner's challenges to arbitration do not relate specifically to the Arbitration Agreement, nor do they underlie a claim that Petitioner failed to assent to the terms of the November 4, 1999 Agreement, her challenges must be resolved by the arbitrator, rather than the court. The Fourth Circuit, accordingly, vacated the district court's order denying Elite's motion to compel arbitration and remanded with instructions to grant the motion.

REASONS FOR DENYING THE PETITION

Petitioner has failed to provide the Court with a basis to grant certiorari in this case. First, contrary to Petitioner's arguments, there is no "deep split" of authority on whether

arbitration can be compelled when the underlying contract containing the arbitration agreement is alleged to be void *ab initio*. Lower courts have faithfully adhered to this Court's holding in *Prima Paint* and have compelled arbitration where the challenge to arbitration goes not to the making or performance of the arbitration agreement but to the making or performance of the underlying contract. Every federal appellate court to address this issue has consistently applied this Court's ruling in *Prima Paint*, while the state supreme court cases relied upon by the Petitioner are inapposite or a misapplication of the law. Thus, notwithstanding Petitioner's efforts to manufacture a split of authority, no such split exists.

Moreover, Petitioner's claim that the decision below conflicts with this Court's precedent interpreting and applying the FAA is wholly without merit and provides no basis for granting certiorari. The Fourth Circuit's decision below is consistent with this Court's long-standing and well-settled federal policy regarding arbitration.

I. NO "DEEP SPLIT" OF AUTHORITY EXISTS.

Petitioner incorrectly contends that there is lower court disagreement over the central issue raised in this case. While Petitioner obscures the fact that every federal appellate court to consider this precise issue has reached the same conclusion, she points to three state supreme court decisions and claims that a "deep split" exists. However, closer inspection of these authorities reveals that only one of the cases can be characterized as in conflict with the weight of federal authority, and this outlier case does not provide sufficient grounds for certiorari. This is especially so given recent developments in this area of the law, in which courts, federal and state alike, have consistently rejected the proposition of law advocated by Petitioner.

A. Federal Authority Recognizes That Challenges to the Contract Based on Illegality Must Be Considered by the Arbitrator Rather Than a Court.

The opinion below is the latest of a trio of recent federal appellate decisions that have held, unanimously, that claims that an entire contract is void *ab initio* as a result of a violation of state law present a question for an arbitrator, rather than a court. *See Burden v. Check Into Cash of Ky., LLC*, 267 F.3d 483 (6th Cir. 2001), *cert. denied*, 122 S. Ct. 1436 (2002); *Bess v. Check Express*, 294 F.3d 1298 (11th Cir. 2002). *Burden* involved the unremarkable application of *Prima Paint*, 388 U.S. at 404, in which this Court limited a court's discretion in deciding whether to enforce an arbitration provision to "consider[ing] only issues relating to the making and performance of the agreement to arbitrate," rather than including issues relating to the making or performance of the entire contract in which it appears. While the plaintiffs in *Burden* sought to avoid *Prima Paint's* severability doctrine by claiming that the underlying contracts were void, the Sixth Circuit aptly recognized that the authorities upon which they relied involved "questions of signatory power, not contract content." *Burden*, 267 F.3d at 489. The court consequently explained that the *Prima Paint* rule would not apply if the plaintiffs produced evidence that they did not actually sign, or lacked signatory power to ratify, the agreements at issue. When the challenge to arbitrability did not involve such a question of signatory power, however, any attack on the contract as a whole (including based on allegations of illegality) had to be decided by the arbitrator, consistent with *Prima Paint*. *See id.* at 490.

Both *Bess* and the Fourth Circuit's opinion in this matter embraced *Burden*. *Bess*, like *Burden*, involved an attack on an arbitration clause contained in a deferred deposit check cashing transaction. The plaintiff sought to avoid arbitration

by claiming that the underlying contracts violated state law, but the Eleventh Circuit recognized that the plaintiff "challenges the *content* of the contracts, not their *existence*." *Bess*, 294 F.3d at 1305 (emphasis in original). Under *Prima Paint*, a claim that a contract is void *ab initio* "is an issue for the arbitrator," rather than the court. *Id.* at 1306. Moreover, after surveying precedent on this issue, the Eleventh Cir cuit noted that "[w]e are aware of only one other circuit to address the question presented in this case . . . and that circuit reached the same conclusion that we reach today." *Id.* (citing *Burden*).

The decision of the Fourth Circuit below reached the same results as the Sixth and Eleventh Circuits: "We note that our conclusion is squarely in accord with the Sixth Circuit's recent and well-reasoned decision in *Burden* . . ." (Pet. App. 10). The unanimous Fourth Circuit explained, consistent with the Eleventh and Sixth Circuits, that *Prima Paint's* sever-ability rule does not apply "when the party seeking to avoid arbitration contends that it never assented in the first place to the contract containing the arbitration provision," but that challenges based on the perceived illegality of the underlying contract attack the contract as a whole rather than the arbitration clause. As such, these issues must be directed to the arbitrator.

The results in these cases comprise a consistent reading and application of *Prima Paint*, and comport with existing federal authority. *See, e.g., Large v. Conseco Finance Servic-ing Corp.*, 292 F.3d 49, 53 (1st Cir. 2002) ("[Plaintiffs] do not allege that [defendant] engaged in illegal conduct with respect to the arbitration clause itself."); *Primerica Life Ins. Co. v. Brown*, __ F.3d __, __ n.2 (5th Cir. 2002), 2002 U.S. App. LEXIS 17836, at *6 n.2 (5th Cir. Aug. 28, 2002) (finding that the district court erroneously held that *Prima Paint* did not apply "to defenses which render a contract void"); *Lawrence v. Comprehensive Business Servs. Co.*, 833 F.2d 1159, 1162 (5th Cir. 1987) ("Because the Lawrences do not attack the

arbitration agreement itself, *Prima Paint* requires that their claim of illegality be arbitrated pursuant to the contract."); *National R.R. Passenger Corp. v. Consolidated Rail*, 892 F.2d 1066, 1070 (D.C. Cir. 1990) (holding that the district court "erred in treating the arbitration clause as unenforceable merely because the substantive contract provision in dispute between the parties may—if the district court is correct about public policy—be unenforceable"); *Sweet Dreams Unlimited, Inc. v. Dial-A-Mattress Int'l, Ltd.*, 1 F.3d 639, 642 (7th Cir. 1993). These cases demonstrate that, contrary to Petitioner's suggestion, the federal courts have reached a consensus on the scope and applicability of the FAA pursuant to *Prima Paint*.

In the face of this clear case law, Petitioner suggests that there is a split among federal courts by citing the Third Circuit's decision in *Sandvik AB v. Advent Int'l Corp.*, 220 F.3d 99 (3d Cir. 2000). The quotations to *Sandvik* in the certiorari petition are taken out of context. (Pet. 14-15). *Sandvik* involved a situation in which one party claimed that it had not assented to the contract from the outset: "Advent contends that the agent who signed the agreement on its behalf lacked authority to do so and that it had so notified Sandvik . . ." *Id.* at 100. In other words, *Sandvik* is a perfect illustration of the cases that *Burden* described as involving "questions of signatory power, not contract content." *Burden*, 267 F.3d at 489. Because *Sandvik* involved questions of signatory power rather than contract content, the Third Circuit affirmed the denial of the motion to compel arbitration and confirmed the common understanding of *Prima Paint* detailed above. As a result, rather than conflicting with the Fourth, Sixth, and Eleventh Circuits, the Third Circuit's decision in *Sandvik* comports with those decisions.[1]

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[1] Indeed, all three decisions specifically cite *Sandvik*. *See, e.g., Burden*, 267 F.3d at 489; *Bess*, 294 F.3d at 1306; Pet. App. at 10.

In endorsing the severability rule in *Prima Paint*, this Court honored "the unmistakably clear congressional purpose that the arbitration procedure, when selected by the parties to a contract, be speedy and not subject to delay and obstruction in the courts." *Prima Paint*, 388 U.S. at 404. The rule advocated by Petitioner—and rejected by federal courts—would oblige courts to decide dispositive issues, which would vitiate the benefits of arbitration and contravene the purposes of the FAA For that reason, courts have consistently applied the *Prima Paint* rule to challenges to the underlying contract, unless one party presents substantial evidence that it never entered into the contract at issue.

B. Petitioner Misconstrues State Authority.

Faced with unanimity on the federal side, Petitioner seeks to manufacture a split by pointing to three state court opinions. *See Pittsfield Waving Co., Inc. v. Grove Textiles, Inc.*, 430 A.2d 638 (N.H. 1981); *Alabama Catalog Sales v. Harris*, 794 So. 2d 312 (Ala. 2000); *Nature's 10 Jewelers v. Gunderson*, 648 N.W.2d 804 (S.D. 2002). Two of these cases, however, are inapposite, and the remaining decision simply involves "the misapplication of a properly stated rule of law." S. Ct. R. 10.

The decision in *Pittsfield* addressed the issue of unconscionability—not the question of whether allegations of a void *ab initio* contract must be heard by the arbitrator or judge. As such, the opinion does not conflict with the federal authority delineated above. *Pittsfield* has been cited by courts only a handful of times since its issuance, and no court has interpreted it to mean that a challenge to the legality of the underlying contracts exempts the agreement from *Prima Paint*. Petitioner's reliance on *Pittsfield* as contrary authority is, therefore, misplaced.

Similarly, while the result in *Nature's 10* may at first glance appear inconsistent with federal authority, the majority

opinion does not make clear that it is applying the FAA. Indeed, the majority opinion in *Nature's 10* does not cite the FAA, and it relies exclusively on state law and authority from other state courts. While the court's interpretation of state law may be questionable, such matters are not of concern to this Court.

That leaves *Alabama Catalog Sales* as the lone outlier. The Alabama court handed down its divided *Alabama Catalog Sales* before the recent federal cases were decided, and thus did not have the benefit of these opinions.[2] Moreover, the court gave an unduly restrictive reading to *Prima Paint*: "this Court reads *Prima Paint* narrowly." *Alabama Catalog Sales*, 794 So. 2d at 315 n.2. At bottom, the majority in *Alabama Catalog Sales* premised its opinion on a misreading of *Three Valleys Municipal Water Dist. v. E.F. Hutton & Co.*, 925 F.2d 1136 (9th Cir. 1991). Like the plaintiffs in *Burden*, the majority read *Three Valleys* to preclude arbitration as long as a question was raised as to the existence of the underlying contract. As *Burden, Bess*, and the decision below explain, however, *Three Valleys* and cases of similar ilk do not stand for the broad proposition that any challenge to the validity of a contract secures a judicial forum. Rather, they emphasize that only when the case involves "questions of signatory power," *Burden*, 267 F.3d at 489, or "questions of assent to the general contract," *Bess*, 294 F.3d at 1306, or an allegation that the party "never assented in the first place to the contract containing the arbitration provision" (Pet. App. 9) does the trial court intervene. Not surprisingly, in the two years since *Alabama Catalog Sales'* issuance, no state court outside of Alabama

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[2] It should also be noted that Alabama courts have taken a particularly hostile view toward deferred deposit check cashing transactions, even concluding that they do not affect interstate commerce (and thus do not trigger the FAA). *See, e.g., Alternative Fin. Solutions, LLC v. Colburn*, 821 So. 2d 981 (Ala. 2001).

has even cited the decision, and the only two federal courts to consider it have refused to follow its lead. *See Bess*, 294 F.3d at 1306 n.3; *Arnold v. Goldstar Fin. Sys., Inc.*, 2002 U.S. Dist. LEXIS 15564, at *27 (N.D. Ill. Aug. 20, 2002).

If circuit splits develop in this area, or if state courts ignore their federal counterparts,[3] then this issue may certainly become worthy of the Court's attention. At this juncture, however, the divided Alabama decision that predates three unanimous federal circuit opinions does not warrant certiorari. While it is arguable that courts had not settled on the proper scope of *Prima Paint* at the writing of *Alabama Catalog Sales*, those doubts have been laid to rest by the series of clear and consistent federal opinions on this matter. And, to date, no court has rejected the approach embraced by the Fourth, Sixth, and Eleventh Circuits. There simply is no "split" to speak of, and no basis to Petitioner's argument that certiorari is warranted on this ground.

II. THE FOURTH CIRCUIT'S DECISION COMPORTS WITH THIS COURT'S PRECEDENT.

Petitioner's argument that the Fourth Circuit's decision contravenes Supreme Court precedent is also unavailing. Indeed, the Fourth Circuit's reasoning adheres precisely to this Court's precedent interpreting and applying the FAA. Rather than addressing the applicability of *Prima Paint*, Petitioner maintains that the Fourth Circuit decision conflicts with several other Supreme Court decisions. In fact, the cases Petitioner cites are wholly inapposite to the issue addressed below, providing no binding precedent. More generally, the

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[3] Recent state cases demonstrate adherence to the trio of federal circuit court decisions rather than the state cases cited by Petitioner. *See, e.g.*, *Buckeye Check Cashing, Inc. v. Cardegna*, 2002 Fla. App. LEXIS 10336, at *7-*9 (Fla. Ct. App. July 24, 2002) (citing and following *Bess*).

proposition for which these cases stand—that courts are to treat arbitration agreements in the same fashion as any other contract—is advanced by the decision below.

Relying principally upon this Court's decision in *Prima Paint*, the Fourth Circuit concluded that because Petitioner's allegations of usurious rates of interest do not relate to the arbitration agreement, and because her allegations do not underlie a claim that Petitioner failed to assent to the terms of the underlying agreement in the first place, those allegations must be resolved through arbitration. This approach is a straightforward and faithful application of *Prima Paint*, where this Court squarely held that, in considering a motion for a stay to allow for arbitration, the "court may consider *only* issues relating to the making and performance of the *agreement to arbitrate*," and *not* issues relating to the making of the contract generally or its enforceability. 388 U.S. at 404 (emphasis added). The *Prima Paint* decision, of course, follows logically from the text of the FAA, which states that "upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement." 9 U.S.C. § 4. As explained *supra*, the decision also comports with the settled approach of federal appellate courts on this question.

Rather than addressing *Prima Paint*, Petitioner points to several other Supreme Court cases applying the FAA to argue that the Fourth Circuit's decision conflicts with Court precedent. In particular, she cites *Equal Employment Opportunity Comm'n v. Waffle House, Inc.*, 122 S. Ct. 754 (2002), *Doctor's Associates, Inc. v. Casarotto*, 517 U.S. 681 (1996), and *Allied-Bruce Terminix Co., Inc. v. Dobson*, 513 U.S. 265 (1995), for the general proposition that arbitration clauses

should be treated "on the same footing" as other contracts. (Pet. 17-18). These cases have no bearing on the precise issue that was before the Fourth Circuit.

First, *Waffle House* involved a question of whether the FAA required the EEOC to arbitrate a discrimination action when the employee involved signed an arbitration clause. The Court held that it did not because the statute authorizing the EEOC granted it exclusive authority over the choice of forum and prayer for relief once it brings a charge. *See* 122 S. Ct. at 766. Further, the Court explained that the FAA "does not purport to place any restriction on a *nonparty's* choice of a judicial forum." *Id.* at 762 (emphasis added). This Court's decision in *Waffle House* has no bearing here. Unlike the EEOC, Petitioner is a party to the Arbitration Agreement. Indeed, she does not dispute that signed the Consumer Agreement containing the Arbitration Provision.

Second, *Doctor's Associates* concluded that a Montana state law requirement that singularly limited the validity of arbitration agreements was preempted by the FAA. *See* 517 U.S. 681, 688 (1996). While not directly apposite to the issues in this case, the *Doctor's Associates* decision underscores the unencumbered enforcement of valid arbitration clauses—just as the Fourth Circuit has done in this case. And *Allied-Bruce Terminix* addressed the scope of Section 2 of the FAA, which states that its mandate only applies to a "contract evidencing a transaction involving commerce." 9 U.S.C. § 2. The Court held that this phrase should be read broadly, "extending the Act's reach to the limits" of the Commerce Clause power. 513 U.S. at 268. Again, while making clear the breadth of the FAA, this holding does not address the issue before this Court, which falls squarely under the *Prima Paint* doctrine.

In sum, the Fourth Circuit's decision in no way conflicts with the three cases Petitioner cites. As Petitioner herself acknowledges, the common principle articulated in all three

cases is that arbitration clauses stand on the same footing as other contractual provisions, and must be treated as such by courts. The decision below in fact buttresses that principle by disallowing Petitioner from circumventing a valid and enforceable arbitration agreement. In doing so, the decision comports with *Prima Paint*, and advances the Court's consistent and long-standing approach to the FAA.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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In The

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Patricia Snowden,

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Plaintiffs,

v.

CheckPoint Check Cashing and Elite Financial Services, Incorporated

Respondents,

and

Unknown Other Persons and Entities,

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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9 U.S.C. § 4. ..... 5, 6, 7, 8

State

MD. CODE ANN., FIN. INST. § 11-204(a)(1). 9

MD. CODE ANN., COM. LAW § 12-314(b)(1). 9

ARGUMENT

As explained in the petition for *certiorari*, the Fourth Circuit's decision below holding that Patricia Snowden must arbitrate her claims against Checkpoint Check Cashing and Elite Financial Services ("Checkpoint") before there has been any determination that the parties entered into a legal and enforceable agreement squarely conflicts with holdings of at least three state courts of last resort and adds to the confusion among federal and state courts over the scope of this Court's holding in *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967). Because the ruling below misapplies the Federal Arbitration Act, 9 U.S.C. §§ 1 *et seq.* (FAA), by enforcing an arbitration clause in the face of Snowden's allegations that Checkpoint lacked signatory authority to enter into the underlying contract and that illegal terms rendered the entire contract void *ab initio*, the Court should grant the petition for *certiorari* and reverse the lower court's ruling.

I. The Split of Authority on Whether the FAA Authorizes a Court or an Arbitrator to Decide if an Entire Contract is Void For Want of Signatory Authority or Due to Illegal Terms is Substantial.

A. Checkpoint Fails to Distinguish the State Court Cases Conflicting With the Decision Below.

Checkpoint's main theme in opposition is that the authority conflicting with the decision below either is not important enough to warrant the Court's review or is somehow distinguishable. These arguments have no merit. The distinctions Checkpoint attempts to draw among the various federal and state court rulings on the question presented are either inaccurate or irrelevant. Furthermore, recent decisions have only served to broaden this conflict over the proper allocation of authority between courts and arbitrators under the

FAA where there are allegations that a contract containing an arbitration clause is void *ab initio*, never came into being, and therefore never gave rise to an agreement to arbitrate.

Checkpoint concedes, as it must, that the decision below and other recent circuit court rulings squarely conflict with the holding in *Alabama Catalog Sales v. Harris*, 794 So.2d 312 (Ala. 2000), that a court must resolve allegations that a payday loan contract is illegal and void under applicable state law before it can enforce the contract's arbitration clause under the FAA. In arguing that *Alabama Catalog Sales* involves the "misapplication of a properly stated ruled of law," (Opp. at 9) (quoting S. Ct. R. 10), and is an "outlier" decision, Checkpoint ignores both the substantial difference in the various courts' interpretations of the FAA and the precedential significance of decisions on both sides of this split.

The main problem with Checkpoint's characterization of *Alabama Catalog Sales* is that it attempts to explain away a split of authority simply by assuming the correctness of one side of the split and the error of the other side. Checkpoint contends that *Alabama Catalog Sales* erroneously departed from federal circuit court decisions in holding that a court must resolve questions concerning the substantive legality of an underlying contract. (Opp. at 10). But absent any decision from this Court on the question presented, there is no basis for Checkpoint's claim that *Alabama Catalog Sales* misapplied the FAA while the court below did not. Although *Prima Paint* holds that under the FAA an arbitrator must resolve allegations of fraudulent inducement, which would allow for recision of a previously enforceable contract containing an arbitration clause, the Court has never addressed the separate question of who decides allegations that an underlying contract is void *ab initio*, never came into being, and therefore never gave rise to an agreement

to arbitrate. This question continues to generate divergent outcomes among federal and state courts of appeal.

A further problem with Checkpoint's characterization of *Alabama Catalog Sales* and conflicting circuit court authority is that it fails to support the ruling below on Snowden's allegations concerning Checkpoint's lack of signatory authority. Checkpoint argues that the circuit courts agree that courts must decide "questions of signatory power" and "questions of assent to the general contract," (Opp. at 10) before they can order arbitration under the FAA, but that *Alabama Catalog Sales* took this rule a step too far by holding that courts must decide questions concerning the underlying contract's legality. (Opp. at 10-11). Even if this assessment of the case law were accurate, Snowden makes *both* types of allegations in this case, arguing that Checkpoint's payday loan contract is void because its terms are illegal *and* because Checkpoint lacked the requisite signatory authority to enter into a consumer loan agreement under Maryland law. Therefore, under Checkpoint's own assessment of prevailing appellate authority, the decision below was erroneous and the Fourth Circuit should have held that a court must at least resolve Snowden's allegations that Checkpoint had no signatory authority to enter into the contract.

Checkpoint's contention that *Alabama Catalog Sales* is an "outlier" decision is also mistaken. The Alabama Supreme Court recently reaffirmed *Alabama Catalog Sales* in holding that a nursing home whose license to do business in the state had been revoked could not enforce an arbitration clause in its contract with patients because the entire contract was void under state law. *See Community Care of America of Ala., Inc. v. Davis*, ___So.2d___, 2002 WL 31045217 at *3 (Ala. Sept. 13, 2002). In *Community Care*, the court observed that it was undisputed that the state had previously revoked the nursing

home's license, noted that applicable state law rendered void all contracts entered into by unlicensed foreign corporations, and held that precedent had established the "unremarkable proposition that a 'foreign corporation [may] not compel arbitration pursuant to an arbitration clause in a contract [if] the entire contract [is] unenforceable and invalid as a result of the foreign corporation's failure to qualify to do business in Alabama." *Id.* (quoting *Alabama Catalog Sales*, 794 So.2d at 315). Therefore, notwithstanding Checkpoint's attempt to diminish the conflict of appellate authority on the question presented, the split persists even in the face of recent circuit court decisions supporting Checkpoint's arguments.

Nor is the Alabama Supreme Court an "outlier" court on the question presented. Checkpoint fails to distinguish cases from other state courts that conflict with the ruling below by the Fourth Circuit. For example, Checkpoint concedes that the recent holding of *Nature's 10 Jewelers v. Gunderson*, 648 N.W.2d 804 (S.D. 2002), "appear[s] inconsistent with federal authority" (Opp. at 9), because the court there held that an unlicensed business could not enforce an arbitration clause in a contract that was rendered void based on the unlicensed party's lack of signatory authority. Checkpoint then attempts to draw a distinction by claiming that the court in *Gunderson* did not make clear that it was applying the FAA. (Opp. at 9-10). But this is a non-starter because the court in *Gunderson* did not need to make clear that the FAA applied. First, as the dissenting opinion in the case emphasized, it was "uncontested that the Federal Arbitration Act is the controlling law." *Id.* at 809 (Konenkamp, J., dissenting). Furthermore the disputed contract in *Gunderson* involved an agreement to operate a jewelry store franchise. Since the FAA "signals an intent to exercise Congress' commerce power to the full," *Allied-Bruce Terminix Co's, Inc. v. Dobson*, 513 U.S. 265, 277 (1995), a

business franchise agreement like that in *Gunderson* must fall squarely within the scope of the FAA's application. *See, e.g., Doctor's Associates, Inc. v. Casarotto*, 517 U.S. 681 (1996) (applying FAA to fast food restaurant franchise agreement). The ruling in *Gunderson* therefore deepens the split of authority on whether the FAA requires a court or an arbitrator to resolve allegations that a contract containing an arbitration clause is void for want of a party's signatory authority.

Likewise, Checkpoint does not meaningfully distinguish the New Hampshire Supreme Court's holding in *Pittsfield Weaving Co. v. Grove Textiles, Inc.*, 430 A.2d 638 (1981), that a court applying the FAA must decide allegations that a contract containing an arbitration clause is unconscionable. Checkpoint asserts that "*Pittsfield* addressed the issue of unconscionability—not the question of whether allegations of a void *ab initio* contract must be heard by the arbitrator or judge." (Opp. at 9). But Checkpoint does not even attempt to explain why the FAA would ever treat these two types of allegations aimed at invalidating an entire contract containing an arbitration clause differently from one another. Both allegations have the effect of voiding the whole contract, *see Pittsfield*, 430 A.2d at 639, both would prevent any contract containing an arbitration clause from ever coming into existence, and both therefore would implicate "the making of the agreement for arbitration," 9 U.S.C. § 4, so as to require judicial resolution under the FAA. The New Hampshire Supreme Court's holding in *Pittsfield* therefore is squarely in conflict with the ruling below by the Fourth Circuit.

Checkpoint fails to reconcile the deep split of authority among the lower courts on the question presented. As Checkpoint emphasizes, at least two other federal circuits have held consistent with the decision below that allegations that a

contract containing an arbitration clause is void for want of signatory authority or due to illegal terms must be resolved through arbitration. (Opp. at 6-7). These decisions conflict with decisions of an equal number of state courts of last resort holding that the FAA requires courts to resolve these types of allegations because an argument voiding an entire contract necessarily implicates the making of any arbitration agreement contained therein. The Court should grant review to resolve the split of authority on this important question of federal law.

B. Recent Cases Highlight the Extent of Conflict Among the Federal and State Courts of Appeal Over the Question Presented.

In the short period since the Fourth Circuit issued its decision below, at least three distinct positions have surfaced in state and federal appellate rulings on whether the FAA requires a court or an arbitrator to resolve allegations that a contract containing an arbitration clause is void *ab initio*. While courts embracing all three positions recognize *Prima Paint*'s holding that an arbitrator must resolve allegations of fraudulent inducement that would render a previously valid contract voidable, these courts are in sharp disagreement with one another over where to draw the line between *Prima Paint* and the command of Section Four of the FAA that courts resolve allegations related to the making of the arbitration agreement.

As described herein, the Alabama Supreme Court recently reaffirmed its earlier holding that the FAA requires judicial resolution of all allegations that a contract containing an arbitration clause is void *ab initio*. *See Community Care*, ___So.2d___, 2002 WL 31045217 at *3 (reaffirming *Alabama Catalog Sales*). This holding that courts always must resolve allegations implicating the existence of a contract is consistent

with the reasoning of the Third Circuit's opinion in *Sandvik AB v. Advent Int'l Corp.*, 220 F.3d 99 (2000). While Checkpoint is correct that *Sandvik* involved allegations that a party lacked signatory authority, not allegations that a contract's terms were illegal, the Third Circuit held that *Prima Paint* only applies to allegations that a contract is voidable and that allegations that a contract is void must be decided by a court. *Id.* at 107. These courts view *any* allegation concerning the existence of the underlying contract as necessarily implicating the making of the arbitration agreement under Section Four of the FAA.

As was explained in the petition for *certiorari* and in Checkpoint's brief in opposition, the Fourth Circuit below and at least two other circuits have taken a different position in holding that *Prima Paint* requires parties to arbitrate not only allegations that a contract is voidable, but also any allegation that a contract is void *except* where such allegations are based on a party's lack of assent to the underlying contract. *See* Pet. App. 10; *Burden v. Check Into Cash of Ky., LLC*, 267 F.3d 483, 490 (6th Cir. 2001), *cert. denied*, 122 S. Ct. 1436 (2002); *Bess v. Check Express*, 294 F.3d 1298, 1305-06 (11th Cir. 2002). These courts view *only* allegations relating to a party's assent to the underlying contract, but no other allegations aimed at the entire contract, as implicating the existence of an arbitration agreement under Section Four of the FAA.

Finally, a recent Fifth Circuit decision cited by Checkpoint (Opp. at 7) embraces a different position from all of those described herein. In *Primerica Life Ins. Co. v. Brown*, 304 F.3d 469 (5th Cir. 2002), the court held that *Prima Paint* applies to require arbitration of *all* allegations related to an underlying contract, *including* allegations that a contract is void for want of a party's assent. The court in *Primerica* ordered a party who was conclusively determined to have been "profoundly retarded

since birth," *id.* at 472 (Dennis, J., concurring), to arbitrate his claim that he lacked the capacity to contract under applicable state law. When faced with the argument that *Prima Paint* only requires arbitration of allegations that would render a contract voidable, but not those that would render a contract void or non-existent, the Fifth Circuit rejected the distinction altogether and held that all defenses or challenges to the existence of an underlying contract must be sent to arbitration under the FAA and *Prima Paint*. *Id.* at 471-72. In the Fifth Circuit's view, *no* allegations relating to the underlying contract as a whole, not even allegations that a party lacked the capacity or authority to enter into a contract, can ever implicate the making of the arbitration agreement under Section Four of the FAA.

In light of these conflicting interpretations of the FAA and *Prima Paint*, the Court should grant the petition for *certiorari* to resolve the split over this important question of federal law.

II. The Fourth Circuit's Decision Below is Inconsistent with the FAA's Policy of Placing Arbitration Agreements on the Same Footing as Other Contracts.

In answer to the argument that the decision below conflicts with this Court's holdings that the FAA places arbitration agreements on the same footing as other contracts, Checkpoint contends that *Prima Paint* resolves the question presented conclusively and that this Court's more recent decisions "have no bearing" on this case. (Opp. at 12-13). While this position is consistent with the Fourth Circuit's ruling below, it ignores how Snowden's allegations concerning Checkpoint's payday loan contract differ from those at issue in *Prima Paint* and make this case more like what the Court recently addressed in *Equal Employment Opportunity Comm'n v. Waffle House, Inc.*, 534 U.S. 279 (2002).

Snowden alleges that there was never an enforceable contract between herself and Checkpoint because Checkpoint was not licensed to make consumer loans in Maryland and because Checkpoint's usurious interest rates rendered any loan agreement void under state law.[1] Unlike the allegations of fraudulent inducement in *Prima Paint*, which would render a previously enforceable contract voidable or revocable,[2] Snowden's allegations would render any agreement between the parties void *ab initio* and therefore raise the question of whether the parties ever entered into an agreement to arbitrate claims.

Checkpoint's argument and the Fourth Circuit's holding below that Snowden's claims are subject to arbitration under the FAA parallel an earlier Fourth Circuit ruling that this Court overturned in *Waffle House*. There, the Fourth Circuit had held that the EEOC's claims brought on behalf of an individual were subject to arbitration under an agreement to which the EEOC was not even a party based on the court's evaluation of the FAA's policy favoring arbitration. *Waffle House*, 534 U.S. at 290. This Court reversed and held that the FAA's policy goals did not support arbitration of the EEOC's claims because the Act requires courts "to place arbitration agreements on equal footing with other contracts, but it 'does not require parties to arbitrate when they have not agreed to do so.'" *Id.* at 293 (quoting *Volt Info. Sciences, Inc. v. Bd. of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 478 (1989)). The same result should apply here because Snowden's allegations call

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[1] *See* MD. CODE ANN., FIN. INST. § 11-204(a)(1) (requiring license to make consumer loans); MD. CODE ANN., COM. LAW § 12-314(b)(1) (loans with interest in excess of statutory limit are unenforceable).

[2] *See Burden v. Check Into Cash*, 267 F.3d at 489 (citing *W.T. Langley v. FDIC*, 484 U.S. 86, 93-94 (1987)).

into question whether the parties ever entered into an agreement to arbitrate.

The Court should grant the petition for *certiorari*, reverse the judgment below, and hold that the FAA requires courts to resolve allegations that a contract containing an arbitration clause is void *ab initio* and therefore never came into being.

CONCLUSION

The petition for a writ of *certiorari* should be granted.

Respectfully submitted,

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